Supreme Court of the United States

OCTOBER TERM, 1942

No. 1020

NORTH KANSAS CITY DEVELOPMENT COMPANY, NORTH KANSAS CITY BRIDGE AND RAILROAD COMPANY AND NORTH KANSAS CITY LAND AND IMPROVEMENT ASSOCIATION,
Petitioners,

against

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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STATEMENT OF THE CASE.

Introduction.

Controverting and deeming insufficient petitioners' [1] statement, respondent [2] makes its own statement of the case.

Burlington instituted this condemnation suit to acquire a collection of 19 separate and isolated industrial lead tracks at North Kansas City, which tracks are con-

[1] Hereinafter called Development Co. or Bridge Co. The Improvement Assn. assigned no errors and prosecuted no appeal from the District Court's judgment (R. 240-252). Accordingly it has no standing to petition this court for certiorari.

[2] Hereinafter called Burlington.

nected with, and are accessible to, only the Burlington Railroad (Findings 17, 18, 20, Appendix v-vi).[3] Burlington has exclusively operated the condemned tracks, for more than a quarter of a century (Finding 21, App. vi). The tracks were constructed at various times between 1912 and 1937, *not for the purpose of complying with the Bridge Co.'s charter obligations* (Finding 31, App. ix), but in order to fulfill private real estate contractual obligations assumed by the Development Co. (Findings 13-15, App. iii-v).

The Development Co., having no railroad franchise (Findings 2, 22, App. i, vi; R. 1825), arranged with Burlington to operate the lead tracks and serve the industries located thereon (R. 292-294; Findings 15, 16, 17, 32, App. iv, v, ix; R. 1490-1491, 1845). Accordingly, in March, 1913, Burlington published and filed with the Interstate Commerce Commission switching tariffs governing its movements to and from these North Kansas City industries (Finding 21, App. vi). Burlington thereby assumed the obligations and acquired the rights of a railroad common carrier in the district (R. 464). The North Kansas City shippers thereby became, and presently are, Burlington's transportation customers (R. 1845-1847).

Prior to 1921, Burlington paid no compensation for the privilege of operating such lead tracks as had been constructed up to that time[4] (R. 326; R. 1490-1491). On May 17, 1921, *the Development Co. proposed that Bur-*

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[3] The District Court's memorandum opinion, Findings of Fact and Conclusions of Law appear at R. 116-127. For this Court's convenience, we have printed the Findings, together with supporting record references, in the appendix of this brief (App. i-ix).

[4] Between 1912 and 1921, 4.67 miles of lead track had been constructed. Ex. 1 (R. 263) shows the date when each segment of lead track was constructed, and one inch on the map equals 200 feet on the ground.

lington enter into a lease whereby Burlington would operate all the lead tracks then and thereafter to be constructed and *pay the Development Co.* $1 for each loaded car moved into or out of the industrial district—*the Development Co. to maintain the lead tracks* in good operating condition (Finding 32, App. ix; Def. Ex. 11, R. 1007-1009; R. 1490-1491). Burlington accepted the Development Co.'s written proposal.

Because the Development Co. followed the practice of carrying title to the Development Co.'s railroad tracks in the name "Union Depot, Bridge and Terminal Railroad Company," Burlington did, at the special request of the Development Co., make all checks payable in the name of the Bridge Co. (Def. Ex. 9, R. 659 at 792). The initial bill for the use of the tracks under the lease of May 17, 1921 carried the notation "Bill 4183-B for trackage, placing of switch cars at industries, North Kans. Cy., *North Kansas City Development Co. tracks being used*" (Def. Ex. 9, R. 659 at 790).

If the lease of May 17, 1921 had been executed by the Bridge Co., it would have been necessary to secure Missouri Public Service Commission approval—otherwise the lease would be void.[5] However, the lease being made by the Development Co., no Public Service

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[5] No railroad corporation * * * or common carrier shall hereinafter * * * lease * * * the whole or any part of its railroad * * * necessary or useful in the performance of its duties to the public * * * without having first secured from the commission an order authorizing it so to do. Every such * * * lease * * * made other than in accordance with the order of the commission authorizing the same shall be void. * * * Nothing in this subsection contained shall be construed to prevent the * * * lease * * * of property which is not necessary or useful in the performance of its duties to the public, and any lease of its property by such corporation * * * shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public. * * * (1939 Mo. R.S., Sec. 5632.)

Commission approval was obtained (Findings 30, 32, App. viii, ix; R. 297).

Neither the Development Co. nor the Bridge Co. ever had charter power to construct, own, or operate the condemned lead tracks (Findings 2, 31, App. i, ix). *Neither the Development Co. nor the Bridge Co. ever held itself out to the public as a railroad common carrier* (Finding 22, App. vi; R. 297, 417). *Neither the Development Co. nor the Bridge Co. ever, in fact, devoted the condemned property to public use* (Finding 22, App. vi; R. 296-297, 417, 462).

On the basis of the foregoing facts, the District Court concluded, as a matter of both state and federal [6] law, that the condemned industrial lead tracks had long since become a part of the Burlington railroad system (Conclusion (m), R. 126; *Alton R. Co.* v. *Illinois Commerce Commission,* 305 U. S. 548, 553-555; *Missouri Southern R. Co.* v. *Public Service Commission,* 279 Mo. 484, 214 S. W. 379), and that Burlington was under a legal duty permanently to continue their operation (*State ex rel, Public Service Commission* v. *Missouri Southern R. Co.,* 279 Mo. 455, 214 S. W. 381; Conclusion (m), R. 126; *Alton R. Co.* v. *Illinois Commerce Commission,* 305 U. S. 548, 553-555; *Missouri Southern R. Co.* v. *Public Service Commission,* 279 Mo. 484, 214 S. W. 379).

The Pleadings.

Burlington's petition described 19 separate parcels of right-of-way, comprising 18.86 acres, and named the Development Co. as the record owner of 17.25 acres (R. 8-29), the Improvement Assn., as the record owner of 1.04 acres (R. 14-15), Messrs. Curran and Fratt as record owners of undivided interests in .26 of an acre

[6] The greater per cent of the cars switched over these tracks are moving in interstate commerce (R. 731, 713, 429).

owner of .30 of an acre (R. 10). See Findings 26-27 (R. 14-15)[7] and the so-called "Bridge Co." as the record (App. vii) and Findings after Verdict (R. 155-157).

The corporate defendants, whose policies were dictated and controlled by Armour and Swift from 1903 to 1929 (Def. Ex. 9, R. 659 at 788) and by the Van Swerin-gens and their New York bankers from 1929 to date[8] denied Burlington's power and right to condemn (R. 36 at 38; R. 38 at 39). These railroad-banking interests caused an answer to be filed for the Development Co.

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[7] We disagree with petitioners' statement to the effect that Curran, Fratt, and the Improvement Assn. are in the same position as the Development Co. (Brief 10), because the evidence showed, and the Court found, that the Development Co. built and owned all the tracks (Findings 14, 27, App. iv, vii), because Curran and the Fratts did not deny Burlington's power to condemn (R. 34-35) and because neither the Improvement Assn., nor Curran nor Fratt assigned errors or filed briefs in the Court of Appeals. Accordingly, the District Court's Findings, Conclusions, and Judgment were final as to these defendants.

[8] See Bridge Co.'s Return to I. C. C. Questionnaire, filed several years after Burlington's condemnation suit (R. 1296 at 1301-1307), where counsel consume seven pages of the record soliloquizing as to whether the "Bridge Co." is controlled by Terminal Shares, Marine Midland Trust Co., Guaranty Trust Co., Douglas & Co., Alleghany Corporation, or Missouri Pacific Railroad. Without so much as disclosing to the Interstate Commerce Commission the facts set forth in Burlington's condemnation petition concerning the termination of the Bridge Co.'s corporate charter, counsel advised the Interstate Commerce Commission, as required by statute, that they were "of the opinion that the proposed construction, as set forth in the application of the North Kansas City Bridge and Railroad Co., * * * is within the charter powers of the North Kansas City Bridge and Railroad Co." (R. 1340.) For filing this application, counsel charged a modest $17,295 (R. 1525). Dead or alive, this hopelessly insolvent Bridge Co. (R. 1535, 1531) has had a passion for bookkeeping and litigation, although it has never owned a box car or a locomotive and never hired an engineer or a fireman (R. 296), never constructed a foot of its 25-mile railroad (R. 290-292, 296, 283; Def. Ex. 9, R. 659 at 747-751, 757; Def. Ex. 19, R. 1022 at 1029), and never turned a hand toward the construction of its depot (R. 296).

wherein it was alleged that company "had no right, title, or interest in any of the lands sought to be condemned by plaintiff" (R. 37), despite the fact that the Development Co.'s vice president and general manager advised the attorneys that the land was owned by the Development Co. (R. 1663-1667), that the land stood of record in its name and no conveyance had ever been made by it (R. 1667, 293-294; Findings 26-27, App. vii).

These railroad-banker interests also caused the Bridge Co. to file an answer alleging that it was incorporated under Art. 2, Ch. 12, R.S., 1899, "for the purpose of constructing and operating a *railroad for public use*" (R. 443); that the Development Co. at one time owned nearly all the land described in Burlington's petition; that the Development Co. was and still is a real estate development company; that the Development Co. "entered into a plan and program to develop said real estate as an industrial district and to sell industrial and factory sites therein; that the Development Co. entered into contracts by which, in order to induce prospective purchasers to purchase industrial and factory sites in said industrial district, they agreed with such prospective purchasers to cause to be constructed lead tracks and through switching tracks connecting with private industry tracks of said industries * * * for the purpose of switching cars to and from said industries"; that "by reason of the fact that said Development Co. * * * did not have charter power to construct, maintain, or operate a railroad or railroad properties," said Development Co. *"induced this defendant to construct such railroad tracks and railroad right-of-ways as would fulfill the contracts so made by said Development Co.* * * *" (R. 45) "* * * and since such construction of said tracks and right-of-ways, this defendant has continuously owned, operated, and used said tracks and right-of-ways for *railroad purposes* as a common carrier of freight and passengers * * *" (R. 46);

that "in manner and form aforesaid, this defendant has caused its *railroad properties* described in plaintiff's petition to be continuously operated as *railroad properties,* and in the manner and form aforesaid, this defendant has operated as a *railroad corporation* and has caused its said *railroad properties* to be continuously devoted to a public use, and the same now are devoted to public use as *railroad properties*" (R. 49) "during all of which time *it has been chartered as a railroad corporation,* and during all of which time *it has claimed the right to own and operate the said properties as railroad properties* * * * and therefore the plaintiff has no right to deny or question the power or authority of this defendant to own or operate said properties as *railroad properties* or to deny or question this defendant's authority to devote said properties to a public use as *railroad properties*" (R. 50, 51—Italics ours).

In the District Court, defendants did not contend, as they now claim, "that the Bridge Co. was, in fact, a Union Depot Co. * * * and that the self-executing forfeiture provisions * * * did not apply to a Union Depot Co." (Pet. p. 4). As indicated by the Court of Appeals' opinion, "this argument would seem to constitute a departure from the theory of the pleadings and of the trial before the District Court" (R. 2023). For Bridge Co.'s trial theory, see also: Curran, R. 435; Def. Ex. 21, R. 1051 at 1055 and 1110-1112; Def. Ex. 4a, R. 839 at 855. When the case was submitted February 23, 1940, the Bridge Co., by its requests 19 and 22, asked the District Court to find that it had been formed under Art. 2, Ch. 12, R.S., 1899 as *a railroad corporation* (R. 93, 99). Not once in 27 pages of requested findings (R. 85-115), did the Bridge Co. mention incorporation or existence as a Union Depot Co. This contention was first advanced in additional requests, filed April 24, 1940, *two months after the case was submitted* (R. 88), *and one month*

after the Court had found the facts, declared the law and indicated its judgment (R. 116-127). The Bridge Co.'s pleadings and trial theory are accurately stated by the District Court in its memorandum opinion of March 30, 1940, as follows:

> "There would be no question that the plaintiff has the legal right to condemn the railroad property involved for railroad purposes were it not for the contention of one of the defendants (North Kansas City Bridge and Railroad Co.) that it too is a *railroad corporation* and that it owns and is operating and has owned and continuously has operated a railroad upon the properties * * *."

Erroneous Statements in Petition for the Writ.

Defendants incorrectly state "that the reason for the institution of this condemnation suit was that defendants desire to build a crossing over the tracks of the Burlington so as to connect the tracks here sought to be condemned with the tracks of the Bridge Company which operated on the bridge over the Missouri River * * * and that Burlington feared that its monopoly in the transportation of traffic out and into the North Kansas City district would be ended and that the shippers in that district would have the choice of carriers" (Pet. 6-7). Whether or not it is necessary that Burlington acquire the property by condemnation or continue to lease it from the Development Co., relying upon the latter to maintain the tracks under the lease (R. 1007), does not present a judicial question. Under Missouri law, Burlington's choice between these alternatives is not reviewable in the courts (*Southern Illinois & Mo. Bridge Co.* v. *Stone,* 174 Mo. 1, 73 S. W. 453; *City of St. Louis* v. *Senter Commission Co.,* 336 Mo. 1209, 84 S. W. 2d 133). But if reasons were necessary, *the admittedly deplorable condition in which the Development Co. has maintained the tracks*

(R. 1440-1443, 1898-1899, 1901-1902, 1899), since the Van Sweringens and their New York bankers acquired control, would furnish adequate grounds.

Moreover, before any crossing of the Wabash and Burlington main line rights-of-way could be constructed so as to connect the bridge with the condemned tracks, and thereby enable some other railroad to invade Burlington's exclusive industrial territory, the Interstate Commerce Commission would first have to determine whether public convenience and necessity require the construction of such a crossing. (49 U. S. C. secs. 18-21; *Texas & Pacific Ry. Co.* v. *Gulf C. & S. F. Ry. Co.*, 270 U. S. 266.) Nearly a year after Burlington's second condemnation petition was filed, the Bridge Co. filed an application with the I. C. C. for a certificate to construct such an overhead crossing (Pl. Ex. 23, R. 1295-1341). The proposed overhead crossing is 5,200 feet long and requires the construction of 8,000 additional feet of track (R. 1335-1336). Maps showing the overhead viaduct and the auxiliary trackage are shown at R. 1330-1334. Other evidence shows that the cost of this project would be from $400,000 to $676,000 (Def. Ex. 19, R. 1022 at 1041). Since *the condemned tracks cannot be simultaneously served by more than one railroad* (R. 1346, 462-463) and since the purpose of the overhead crossing and auxiliary track is to eliminate the Burlington and substitute the Missouri Pacific as the switching carrier (R. 662, 1342; Def. Ex. 19, R. 1022 at 1037-1038, 1042), neither the shipping public *nor the hopelessly insolvent Bridge Co.* (R. 471-2) has anything to gain by this wasteful and improvident expenditure of money (R. 712, 462-463; Def. Ex. 19, R. 1022 at 1030-1031, 1042, 1043). Indeed, the Missouri Supreme Court has wisely observed that "useless construction tends to increase the burden of the public in transportation charges" (*C., B. & Q. R. Co.*

v. *McCooey,* 273 Mo. 29, 200 S. W. 59, 63). Justice Brandeis made the same observation in *Texas & Pacific Ry. Co.* v. *Gulf C. & S. Ry. Co.,* 270 U. S. 266, 277, when he said:

> "* * * Congress * * * recognized that * * * the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. * * *"

Nor does the I. C. C. grant certificates for the purpose of enabling one railroad to invade the exclusive industrial territory of another, where, as in this case, the present Burlington railroad service is adequate (R. 1853, 467; Def. Ex. 19, R. 1022 at 1030-1034, 1042, 1043); *Toledo, Peoria & Western Railroad Operations & Construction,* 162 I. C. C. 100; *Piedmont & Northern Ry. Construction,* 138 I. C. C. 363, 400-402). Contrary to the statement made in defendant's petition (pp. 6-7), this overhead crossing project would not give the North Kansas City shippers any more access to main-line railroad carriers than is presently afforded by Burlington via its Murray Yards (Def. Ex. 9, R. 712; Def. Ex. 19, R. 1022 at 1026-1027, 1030; R. 462, 463).

Bearing in mind that the Bridge Co. (dead or alive) has been hopelessly insolvent for more than twenty years (R. 471-472, 1339), that its liabilities presently exceed its assets by more than $5,000,000 (R. 1530-1535) and that it has had no bank account since 1903 (Def. Ex. 9, R. 659 at 754), it is interesting to note the response made by the Bridge Co. to Q. 28 of its "Return to I. C. C. Questionnaire" when asked *how the overhead crossing project was to be financed.* In response to this I. C. C. question, the Bridge Co. answered (Pl. Ex. 23, R. 1295, 1319):

> "There are several methods available to applicant to finance the proposed construction and purchase of equipment, *all of which are being studied by the applicant.*" (Sounds like Amos 'n Andy!) The Bridge Co. says the project "had been planned ever since the first lead track was built" (Pet. 13) in 1912 *—30 years is a long time to study a financial plan without reaching any conclusion!*

The so-called overhead crossing project is simply a device of the Van Sweringens and their bankers whereby they seek to recoup from either Burlington or the Missouri Pacific the improvident expenditures which they made for these properties (Per Faris, *In re Mo. Pac. R. Co.,* 13 F. Supp. 888, all the facts of which are incorporated in this record (R. 1305).

Van Sweringens' Murphy testified $13,000,000 was paid for the Packers' two-thirds stock interest in the North Kansas City companies (R. 660-662). On motion of the R. F. C., the late Judge Faris refused to permit the Van Sweringens to unload these properties on the Missouri Pacific at that price, because $13,000,000 represented a fraudulent and grossly excessive consideration (13 F. Supp. 888, 890). Judge Faris did not know, what the United States Senate later discovered, that the Van Sweringens also received, as a part of the consideration for this lavish expenditure, a side agreement whereby the Packers promised to divert to the Van Sweringen railroads 35 per cent of the Packers' eastbound Kansas City shipments. Immediately after the transaction between the Packers and the Van Sweringens in October, 1929, the Packers' shipments over the Rock Island, the Santa Fe and Burlington declined, month after month, and, on the other hand, the Packers' shipments over the Missouri Pacific and the C. & E. I. (both Van Sweringen controlled) increased, month after month.[9] The Packers

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[9] [*Subcommittee of Interstate Commerce Committee* (Wheeler Committee) Report submitted pursuant to Senate

had no more right to sell to the Van Sweringens the Burlington's North Kansas City transportation business than had the proverbial urbanite to sell the post office, the court house, or the city hall to his country brother.

We submit the foregoing throws into bold relief the real truth about the "Bridge Co.'s" defense of this litigation, as well as the interests of the Van Sweringens and their New York bankers. It also shows the hopelessly insolvent Bridge Co. and the North Kansas City shippers have nothing to gain by the "overhead crossing"! In addition to furnishing an answer to the erroneous statement quoted from pages 6-7 of the peti-

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Resolution 71 (74th Congress). Volume 24: letter from General Agent Rush of the C&EI to Martin E. Paddon, Agent, U. S. Senate Committee on interstate commerce, stating that as a result of the purchase of two-thirds control of the North Kansas City industrial district, agreement was made whereby the Van Sweringen lines (Mo. Pac., C&EI, etc.) were to be allotted 35% of the Armour and Co. traffic from their Kansas City plant moving to eastern points (Ex. 3858 at p. 10831 of Vol. 24); letter from C&EI General Agent Rush to C&EI General Freight Agent Stevens to same effect (Ex. 3860, p. 10832 of Vol. 24); letter from C&EI General Freight Agent Stevens to C&EI Vice President in Charge of Traffic Ford, stating "I understand control of this business to Missouri Pacific is the result of investment of Van Sweringen interests in the North Kansas City industrial district, having purchased two-thirds control" (Ex. 3861, pp. 10832-10833 of Vol. 24); Ex. 3853 at p. 10821 of Vol. 24 shows Missouri Pacific traffic from Swift and Co. out of Kansas City increased from 19.56% in 1925 to 33.29% in 1936. Ex. 3855-B at p. 10827 of Vol. 24 shows the loadings routed by Swift and Co. from St. Joseph to Chicago, St. Louis, and Kansas City via Missouri Pacific as compared with that routed via Rock Island, Santa Fe, and Burlington, and it shows that *while Missouri Pacific received 14.10% of this business in 1928 (when the deal was made) it received 32.44% in 1930 and, for 11 months of 1936, it handled 55.92% of the business!* Exs. 3858-3882, pp. 10831-10842 of Vol. 24, are letters from various railroad traffic officials with reference to the alleged agreement of Armour and Swift to route 35% of their Kansas City eastbound traffic via Missouri Pacific and C&EI. The foregoing report of the U. S. Senate Committee is a public document and has been incorporated in this record by reference (R. 1305).]

tion, the foregoing also answers the erroneous claims set forth in the petition at pages 13-16.

Throughout their petition and brief, counsel stress the fact that the Bridge Co. has maintained the condemned tracks since 1912 (pp. 5, 11, 12). As a matter of fact, the Bridge Co. has had no bank account since 1903 (Def. Ex. 9, R. 659 at 754), and the books kept in its name by the Development Co. show a hopeless insolvency extending over 20 years (R. 471-472). The District Court found the Development Co. constructed and owns the tracks (Findings 14 and 27, App. iv, vii). By the express terms of the lease, the Development Co. was to "maintain all of said tracks at its own expense in good and safe operating condition" (Finding 30, App. viii; Def. Ex. 11, R. 1007).

On pages 5-6 of their petition, petitioners state they contended in the District Court that Burlington was estopped to show that the Bridge Co. was dead or that it was exceeding its corporate powers, etc. These claims were made in their pleadings, but, on the trial, they conceded that "the question of estoppel is involved *but not an estoppel directly against this railroad company—not an estoppel on account of anything this railroad company did*" (R. 661).

Findings, Conclusions and Judgment of April 24, 1940.

The issue concerning Burlington's right to condemn was submitted to the Court on voluminous evidence (R. 253-1348). After hearing argument and examining briefs, the Court made detailed Findings of Fact (App. i-ix), entered Conclusions of Law thereon (R. 124-126) and adjudged, April 24, 1940, that Burlington had the right and power to condemn (R. 130-131), and the Circuit Court of Appeals affirmed, but indicated the

District Court's judgment might have been based on narrower ground (R. 2014-2027; *Chicago, Burlington & Quincy R. Co.* v. *North Kansas City Development Co.*, 134 F. 2d 142-152). Among other things, the District Court concluded the so-called Bridge Co.'s corporate existence and franchise powers ceased on or before May 10, 1911 (Conclusion (i),[10] R. 125), prior to the construction of any of the tracks and rights-of-way sought to be condemned (R. 287-289; Ex. 1, R. 263; Findings 14-15, App. iv-v), because

> (a) it failed to begin construction of its chartered route within 2 years of its incorporation on May 10, 1901 (Finding 5, App. i-ii);
>
> (b) it failed to invest 10 per cent of its capital within 3 years of May 10, 1901 (Finding 6, App. ii);
>
> (c) it failed to finish and put in operation within 10 years from the time of filing its Articles of Association, any of the railroads or facilities described in its charter (Finding 7,[10] App. ii)—all as required by section 1161, Mo. Rev. St. 1899, being section 5248 Mo. Rev. St. 1939 (*Ford* v. *Short Line Railroad Co.*, 52 Mo. App. 429; *Collins* v. *Martin*, (Mo. Sup.) 248 S. W. 941; *Kansas City Interurban Railway* v. *Davis*, 197 Mo. 668, 95 S. W. 881).

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[10] The District Court's finding that the Bridge Co. "failed to finish and put in operation, within 10 years from the time of filing its Articles of Association, any of the railroads or facilities described therein," was not only supported by substantial evidence—it was not contradicted. Moreover, the opinion of the Circuit Court of Appeals clearly indicates that it also concurred in the District Court's Finding 7, inasmuch as the opinion states that the Bridge Co.'s railroad and depot were never built (R. 2017-2022) and that the bridge was first operated for pedestrians in 1912 (R. 2021) and was never operated by the Bridge Co. for railroad purposes at all (R. 2021). Accordingly, the District Court's Conclusion (i) (R. 125) necessarily follows, regardless of whether or not the Bridge Co. purchased some piers that had been built by a predecessor corporation before the Bridge Co. was organized on May 10, 1901 (R. 760; note 3 of the Court of Appeals opinion, R. 2020).

Throughout their petition and brief counsel repeatedly ignore the fact that the District Court also found that the condemned tracks and rights-of-way were not included in the Bridge Co.'s charter (Finding 31, App. ix); that the condemned tracks did not connect with any tracks included in the Bridge Co.'s charter (Finding 31, App. ix); that the condemned property constituted a collection of isolated industrial lead tracks which are not now, never have been, and cannot be, operated as a unit (Finding 20, App. vi); that they were built by the Development Co. in order to induce sales of industrial real estate (Finding 13, App. iii-iv); that said industrial tracks are connected only with the tracks of the Burlington (Findings 17, 20, App. v, vi); that Burlington had continuously and exclusively operated the condemned tracks and served the public, under published tariffs, pursuant to a lease from the Development Co. (Findings 16, 17, 21, 23, 32, App. v, vi-vii, ix); and that neither the Development Co., the Improvement Assn., nor the Bridge Co. had ever devoted the condemned property to public use (Findings 22, 30, App. vi, ix). The Court further found that, as to the subject matter of this eminent domain proceeding, Burlington had never misled any of the defendants (Finding 34, App. ix). Moreover, the Court concluded, as a matter of law, that estoppel could never be invoked to prevent an otherwise lawful exercise of the power of eminent domain (Conclusion (n), R. 126; *C. B. & Q. R. Co.* v. *McCooey,* 273 Mo. 29, 200 S. W. 59, 64-65; *City of Moberly* v. *Hogan,* 317 Mo. 1225, 1230, 298 S. W. 237, 239).

The Court of Appeals' opinion did not disapprove any of the District Court's findings and, as they are all supported by substantial evidence, they will be accepted by this Court as unassailable (*Alabama Power Company* v. *Ickes,* 302 U. S. 464, 477; *General Talking Pictures Company* v. *Western Electric Company,* 304 U. S. 175, 178;

Adamson v. *Gilliland,* 242 U. S. 350, 352-353; *Davis* v. *Schwartz,* 155 U. S. 631, 636-637). As the District Court and the Circuit Court of Appeals both adjudged that Burlington had the power and right to condemn, it would seem to be immaterial that the Circuit Court of Appeals elected to base its judgment on slightly narrower ground so as to avoid deciding that the Bridge Co.'s corporate existence had ceased on or before May 10, 1911 (Cf. *Helvering* v. *Gowran,* 302 U. S. 238, 245 and note 5 on p. 3, *supra.*)

Burlington's Motion to Dismiss "Bridge Co.'s" Appeal.

Contrary to the theory of ownership sought to be developed in the corporate defendants' pleadings, the District Court found the so-called Bridge Co. neither possessed nor owned any of the property sought to be condemned (Findings 26-27, App. vii). Indeed, counsel for the corporate defendants admitted the District Court's Findings, Conclusions, and Judgment of April 24, 1940 (R. 118-124, 124-126, 130-132) excluded the Bridge Co. from any ownership in the condemned property (R. 1663-1667 at 1666). *More important, the judgment of April 24, 1940 terminated the Bridge Co.'s corporate existence,* and it could not thereafter participate in the litigation except by way of appeal. Moreover, the District Court's Findings, Conclusions and Judgment were the law of the case in that Court (*Mortgage Loan Co.* v. *Livingston,* 66 F. 2d, 636, 640; *Boyle* v. *Chicago, Rock Island & Pacific Ry. Co.,* 42 F. 2d 633, 634-635). Having prosecuted no appeal within three months of the April 24, 1940 judgment, Burlington respectfully submits that the Circuit Court of Appeals had no jurisdiction to entertain an appeal by the Bridge Co. on December 22, 1941 (R. 183-184). Where a judgment terminates all rights of a party to the litigation (and it would be difficult to imagine anything more final than

a judgment terminating one's legal existence), the party must appeal from the judgment within three months or not at all (28 U. S. C. A. Sec. 230; *Hill* v. *Chicago & E. R. Co.*, 140 U. S. 52; *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411; *Reeves* v. *Beardall*, 316 U. S. 283; *Thompson* v. *Murphy*, 93 F. 2d 38; *3 Moore's Federal Practice*, Supp. p. 93; 49 Yale Law Journal 146). Having no corporate existence and owning none of the property, the so-called Bridge Co. was not concerned with the jury trial of September, 1941 fixing the damages (R. 150-151), or with the judgment of October 28, 1941 apportioning the $835,000 award among Fratt, the Improvement Assn. and the Development Co.—Curran having waived his portion in favor of the Development Co. (R. 156, 177-178).

On February 10, 1942, the Bridge Co. filed separate assignments of error (R. 244-252). These attacked only the findings and conclusions of March 30, 1940, and the resultant judgment of April 24, 1940. Of necessity, the Bridge Co.'s claims of error must be based on the 1940 judgment, and any appeal by it must have been limited thereto, because that was exclusively the judgment which put the Bridge Co. entirely out of the litigation.

The Court of Appeals apparently denied Burlington's motion to dismiss the Bridge Co.'s appeal because it felt that neither the trial court nor the Burlington had acted on the theory that the judgment of April 24, 1940 was final as to the Bridge Co. (R. 2027). However, congress has provided that an appeal from a final judgment must be taken within three months (28. U. S. C. A., Sec. 230). This period cannot be extended by calling the judgment "interlocutory" (*Potter* v. *Beal*, 50 Fed. 860; *The Attualita*, 238 Fed. 909). No subsequent action of the District Court could extend the period (*Old Nick Williams* v. *United States*, 215 U. S. 541; *Shore* v. *United States*, 50 F. 2d 669;

Collins v. *United States,* 24 F. 2d 823; *Sprague* v. *C., B. & Q. R. Co.,* 17 F. 2d 768), nor could the three-month period be extended by stipulations, waivers, or other acts of the parties (*Shore* v. *United States,* 50 F. 2d 669; *Robie* v. *Hart-Shaffner & Marx,* 40 F. 2d 871). Because a fundamental question of jurisdiction over the subject matter is involved, Burlington renews its motion to dismiss the Bridge Co.'s appeal on the ground that it was not prosecuted within three months of April 24, 1940.

REASONS RELIED UPON BY PETITIONERS FOR ISSUANCE OF THE WRIT OF CERTIORARI.

While petitioners' application for the writ presents a curious mixture of reasons and argument, together with citations of, and quotations from, legal authority (Pet. 15-28), they appear to be urging five points which we will answer in the order set forth in the petition.

I. Federal Courts Have Jurisdiction of Condemnation Proceedings.

After having enjoyed two trials of the power-to-condemn issue in the District Court [11] and another in the Circuit Court of Appeals (R. 2013-2035), counsel now first suggest that the federal courts have never had jurisdiction of this cause. In support of their contention they cite a minority opinion written by Justice Holmes 40 years ago, *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239 (Pet. 16). They were careful

[11] Def. Ex. 9 (R. 659-960) contains the evidence offered at the first trial which terminated in the judgment of dismissal on November 7, 1938 (R. 1287-1291). The proceedings on the second trial will be found at R. 1-1348.

to avoid reference to the opinion, *subsequently written by Justice Holmes for a unanimous court,* holding the federal courts do have jurisdiction (*Mason City & Ft. D. R. Co.* v. *Boynton,* 204 U. S. 570), wherein the majority view in the *Madisonville* case was approved at page 578. Counsel likewise failed to mention *New York* v. *Sage,* 239 U. S. 57, wherein Justice Holmes again wrote the opinion of a unanimous court in a case involving federal jurisdiction of a condemnation suit brought by New York state.

In any event, congress has provided that "the District Court shall have original jurisdiction * * * of all suits of a civil nature at common law * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and * * * is between citizens of different states" (Sec. 24 of the Judicial Code, 28 U. S. C. A. 41 (1)). "A judicial proceeding to take land by eminent domain and ascertain compensation therefor is a suit at common law within the meaning of the federal Judiciary Act (*Metropolitan R. Co.* v. *District of Columbia,* 195 U. S. 322; *Chappell* v. *United States,* 160 U. S. 499; *Kohl* v. *United States,* 91 U. S. 367); and when the requisite diversity of citizenship exists, such a suit may be brought in, or transferred to, the federal district court of the district in which the land lies (*Mason City & Ft. D. R. Co.* v. *Boynton,* 204 U. S. 570; *Searl* v. *School District,* 124 U. S. 197; *Clinton* v. *Missouri Pacific R. Co.,* 122 U. S. 469; *Mississippi & R. River Boom Co.* v. *Patterson Co.,* 98 U. S. 403; *New York* v. *Sage,* 239 U. S. 57)" 18 Am. Jur., pages 957-958.

To the same effect see *Franzen, et al.* v. *Chicago, Milwaukee, St. P. Ry. Co.* (CCA 7) 278 F. 370, 371, where a list of United States Supreme Court decisions, sustaining the District Court's jurisdiction herein, are cited.

Numerous additional Circuit Court of Appeals citations will be found in 28 U. S. C. A., Sec. 41 (1), Note 33, and 28 U. S. C. A., Sec. 71, Note 123. Inasmuch as the action taken by the United States District Court and the United States Circuit Court of Appeals conformed to the authority granted by congress, as construed by this Court in an unbroken line of decisions extending over 75 years, we think petitioners could not have seriously urged their first point. We cannot escape the notion that petitioners welcomed the trial of this case in the federal courts as long as they entertained the hope of a favorable decision. Having been disappointed, after six years of litigation, they would like to begin anew in the state courts. We respectfully submit their Point I is without merit.

II. Doctrine of Forum Non Conveniens Did Not Require That Federal Courts Refuse Jurisdiction.

As in the case with their Point I, petitioners did not urge this doctrine until they had been accorded two trials in the District Court and one in the Circuit Court of Appeals (Pet. 21). As a ground for urging its application, petitioners incorrectly state that

> "One of the determinative questions in the case is as to the construction of Sec. 1512 R. S. Mo. 1939 and specifically is whether any corporation, *de facto* or otherwise, which *for many years has devoted its property to the public service,* has been recognized as an existing corporation by the state, *has satisfactorily served the public and cannot abandon that service,* may nevertheless have its property condemned by another public service corporation which intends to devote the property to precisely the same public use." (Italics ours.)

The foregoing quotation furnishes an additional illustration of the way petitioners have repeatedly ignored

the findings of the District Court and the Circuit Court of Appeals. The District Court found the Bridge Co. had never devoted its property to public use (Finding 22, App. vi). The Circuit Court of Appeals concurred (R. 2019-2020, 2021, 2022). The evidence was uncontradicted that neither the Bridge Co. nor the Development Co. had ever held itself out to the public as a common carrier (Finding 20, App. viii; R. 297, 417; C. C. A. Op. R. 2022, 2015). The Bridge Co. had never owned a box car or a locomotive, never hired a fireman or an engineer, never published or filed a tariff, never turned a hand toward the construction of its depot (Findings 5, 6, 7, 30, 31, App. ii, viii, ix; C. C. A. Op. R. 2020-2021). Both the District Court and the Circuit Court of Appeals found that the condemned property consisted of an isolated collection of industrial lead tracks that had been constructed to fulfill the Development Co.'s private contractual obligations (Findings 13, 15, 20, App. iii-vi; C. C. A. Op. R. 2016, 2017, 2022, 2015), and that Burlington had alone devoted them to public use (Findings 16, 17, 20, 23, App. v, vi; C. C. A. Op. R. 2020).

As the condemned tracks do not constitute the railroad tracks covered by the Bridge Co.'s charter (Findings 5, 6, 7, 31, App. i, ii, ix; C. C. A. Op. R. 2020-2021), and since they do not connect with such tracks (Finding 31, App. ix; C. C. A. Op. R. 2020-2021), and as they cannot be operated as a unit, being only as an adjunct of the Burlington railroad (Finding 20, App. vi), it would not have been possible for the Bridge Co. to have lawfully devoted them to public use. Obviously, the Missouri Public Service Commission could not compel them to continue a service that had never been initiated (*State ex rel, Sheffield Steel Corp.* v. *Public Service Commission,* 325 Mo. 862, 878-879, 30 S. W. 2d 112, 116-117). The foregoing applies with equal force to any claim petitioners may be advancing in favor of the Development

Co. Contrary to the statements in the petition, the Missouri Supreme Court has already construed Sec. 1512, R. S. Mo. 1939, so as to permit condemnation of property owned by a public utility where the property is not necessary to carry out the charter obligations of the utility (*St. L., H. & K. C. Ry. Co.* v. *Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. 483). Moreover, the Missouri Supreme Court has also construed Sec. 1512, R. S. Mo. 1939 so as to permit condemnation where railroad property is owned by a business corporation, such as the Development Co. (*Kansas & Texas Coal Ry. Co.* v. *Northwestern Coal & Mining Co.* (1901) 161 Mo. 288, 320-321, 323, 61 S. W. 684, 691-692).

Again, petitioners incorrectly state the facts when they claim another novel question of Missouri law is presented, viz., "whether the doctrine that there can be no estoppel against condemnation * * * should be extended so as to preclude the defense here that there is an estoppel against urging that the corporate owner of the property already dedicated to the public use has forfeited its charter or is operating *ultra vires.*" (Pet. 23.) Of course, petitioners have carefully chosen their language so as to create the impression that they are presently devoting the property to public use. But *dedication* to public use is not the same as *devotion* to public use (*United States* v. *.8677 acre of land,* 42 F. S. 91, 98; *State ex rel.* v. *Public Service Commission,* 325 Mo. 862, 878-879, 30 S. W. 2d 112, 116-117). Moreover, the sole purpose of Burlington's petition is to acquire these 19 right-of-way strips and lead tracks for public use by condemnation and the sole purpose of petitioners in urging the doctrines of estoppel and *ultra vires* is to prevent the condemnation. Missouri law is clear that estoppel cannot be urged in bar of condemnation (*C., B. & Q.* v. *McCooey,* 273 Mo. 29, 200 S. W. 59, 64-65; *City of*

Moberly v. *Hogan,* 317 Mo. 1225, 298 S. W. 237; *cf.* Court of Appeals opinion, R. 2026).

The fact that Burlington sued the Bridge Co. as a corporation is immaterial under the Missouri forfeiture section (*Collins* v. *Martin,* Mo. Sup., 248 S. W. 941, 947; *Ford* v. *Kansas City & Independent Short Line R. R. Co.,* 52 Mo. App. 439; *cf.* Court of Appeals opinion (R. 2026-2027)). Petitioners' claim that *ultra vires* may be successfully urged as a defense is equally unavailing because the plain language of section 1512, Mo. R. S. makes previous lawful devotion to public use the primary inquiry on the issue of power to condemn. As the Court of Appeals observed "the question of collateral attack upon corporate powers or authority is not involved" (R. 2027).

We respectfully submit petitioners' Point II has no merit, because no novel questions of Missouri law are presented for solution by the District Court's Findings of Fact, which were approved by the Circuit Court of Appeals. Only by substituting erroneous facts have petitioners been able to assume false issues involving "novel questions of Missouri law"!

III. Burlington Not Estopped to Show Bridge Co. Dead, or Has No Railroad Powers, or Is Not Devoting Property to Public use.

Petitioners' Point III is a repetition of their Point II in another form (Pet. 18, 25-26). By carefully selecting their language, petitioners again seek to create the erroneous impression that the Bridge Co. is already devoting the property to public use and that Burlington seeks to appropriate it for an identical public use. On the basis of this erroneous assumption, they next contend that Missouri courts have never decided whether Burlington should be permitted, under such circumstances, to prevent their urging "waiver, acquiescence

or estoppel * * * to contend that the Bridge Co.'s charter was forfeited or its acts *ultra vires.*" They next state that the conclusion of the Circuit Court of Appeals "finds no support in existing authorities, is probably untenable and, therefore, is probably in conflict with the rule which the Missouri Supreme Court will announce when the question reaches that Court" (Pet. 25).

In the first place, and as previously pointed out, counsel waived their defense of estoppel, as against Burlington, by a judicial admission in the course of the trial (p. 13, *supra*). Moreover, and as previously pointed out, waiver, acquiescence or estoppel are inapplicable where the Missouri forfeiture section is involved. Suits have been instituted in Missouri against such defunct corporations, but such conduct did not operate as an estoppel to urge the forfeiture, it merely resulted in the Missouri Supreme Court sending the litigants back to get their pleadings in accurate shape (*Collins* v. *Martin* (Mo. Sup.), 248 S. W. 941, 947). Concerning defendants' privilege of urging *ultra vires,* section 1512 Mo. R. S. 1939 makes the question concerning the owning corporation's lawful devotion of the property to public use the primary issue on the trial of the right to condemn. As the Court of Appeals said, the previous lawful devotion to public use is, "under section 1512, Mo. R. S. A., always a matter for direct inquiry in a condemnation proceeding, and the question of collateral attack upon corporate powers or authorities is not involved" (R. 2027. *Cf. Kansas, Texas Coal Ry. Co.* v. *Northwestern Coal & Mining Co.,* 161 Mo. 288, 61 S. W. 684).

In any event, the function of the doctrines of estoppel and *ultra vires* is to prevent an inequitable result, viz., one party may not retain his portion of a bargain while refusing to accord the other party his *quid pro quo.* In this condemnation proceeding, such a doctrine might be

applicable if Burlington had already acquired the land and were refusing to pay just compensation on the ground the Bridge Co. had no legal existence or had acted beyond its powers. But no such situation obtains. As the District Court observed, this condemnation suit represents "a controversy * * * entirely new and distinct" (R. 118), wherein Burlington is ready and willing to pay just compensation for the property which it seeks to acquire.

It is also to be noted that, at all times, the Bridge Co. had as much knowledge concerning its failure to construct and operate the 25-mile railroad and depot called for by its charter as did Burlington. The Bridge Co. likewise had at least as much knowledge as Burlington that the first of the condemned tracks was constructed nearly 12 years after the date of the Bridge Co.'s incorporation. If Burlington is to be charged with knowledge of Missouri's forfeiture statute, the Bridge Co. is to be charged with equal knowledge. The Missouri Supreme Court has repeatedly held that where the means of knowledge is equal there can be no estoppel (*In re* Franz' Estate (Mo. Sup.), 344 Mo. 510, 127 S. W. 2d 401, 406; *Grafeman Dairy Co.* v. *Northwestern Bank,* 290 Mo. 311, 235 S. W. 435; *Roth* v. *Hoffman,* 234 Mo. App. 114, 111 S. W. 2d 988).

Finally, the purpose for which defendants seek to interpose the defenses of waiver, acquiescence or estoppel is to prevent Burlington's acquiring this property by condemnation. Missouri's Supreme Court has made it clear that neither waiver, acquiescence, contract or estoppel can be invoked for such purpose (*C., B. & Q. R. R. Co.* v. *McCooey,* 273 Mo. 29, 200 S. W. 59, 64-65; *City of Moberly* v. *Hogan,* 317 Mo. 1225, 1230, 298 S. W. 237, 239).

As the Circuit Court of Appeals concurred in the views expressed above (R. 2026), we respectfully urge

there are no novel Missouri questions presented herein and, accordingly, petitioners' Point III is without merit.

IV. Burlington's Condemnation Involves No Novel Construction of Sec. 1512, Mo. R. S. 1939.

In petitioners' Point IV, they have abandoned the attempt to create erroneous inferences by the use of carefully selected phrases, and boldly assert that if

> "the Bridge Co. cannot prevent the condemnation of its tracks and rights of way, * * * the result would be that the hundred and more industries of North Kansas City could be deprived of all existing railroad service simply because the Bridge Co., *although it has devoted its property to a public use for a quarter of a century,* * * * has either forfeited its corporate charter or has been acting *ultra vires.* Having in mind the fact that this service cannot be abandoned voluntarily, * * * it is inconceivable at the present time that this old statute of 1866 should be so construed that *the present use could be terminated at the instance of another public service corporation and the industries deprived of all transportation service.* An important question of construction not determined by the Missouri courts arises" (Pet. 27).

Such contention by a Bridge Co. that has had no bank account since 1903 (R. 759, 446-447), whose books show a mounting insolvency extending over 20 years (R. 472; Pl. Ex. 18, R. 470-471; Def. Ex. 9, R. 659 at 933-934), that has never hired a fireman or an engineer, never owned a locomotive or a box car, never published or filed a tariff (Findings 5, 6, 7, 30, 31, App. ii, viii, ix; C. C. A. Op. R. 2020-2021), constitutes, we respectfully submit, a classic in factual misstatement.

As we have repeatedly pointed out, the condemned property constitutes a collection of isolated lead tracks that have always been operated by, and are accessible

to, *only the Burlington Railroad* (Findings 17, 18, 20, App. v-vi). Burlington, not the Bridge Co., has exclusively operated the condemned tracks and served the North Kansas City industries for a quarter of a century (Finding 21, App. vi). The tracks were constructed at various times between 1912 and 1937, *not for the purpose of complying with the Bridge Co.'s charter obligations* (Finding 31, App. ix), but in order to fulfill private real estate contractual obligations assumed by the Development Co. (Findings 13-15, App. iii-v).

The Development Co., having no railroad franchise (Findings 2, 22, App. i, vi; R. 1825), arranged with Burlington to operate the lead tracks and serve the industries located thereon (R. 292-294; Findings 15, 16, 17, 32, App. iv, v, ix; R. 1490-1491, 1845). Burlington thereby assumed the obligations and acquired the rights of a railroad common carrier in the district (R. 464). The North Kansas City shippers thereby became, and presently are, Burlington's transportation customers (R. 1845-1847).

As indicated by the Court of Appeals' opinion, the construction given by the Missouri Supreme Court to Sec. 1512, Mo. R. S. 1939 in *Kansas & Texas Coal Ry. Co.* v. *Northwestern Coal & Mining Co.* (1901) 161 Mo. 288, 320-321, 323, 61 S. W. 684, 691-692, and *St. L., H. & K. C. Ry. Co.* v. *Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. 483, settled Burlington's right to condemn herein as a matter of Missouri law (R. 2016-2026). Accordingly, we submit petitioners' Point IV is without merit.

V. Bridge Co.'s Union Depot Powers Also Forfeited by Section 5248 Mo. R. S. 1939.

The contention that the Bridge Co. was a Union Depot Co. (Pet. 18, 27-28) was not pleaded by petitioners in the

District Court, nor did they offer any proof of this fact in either the first or the second trials of the issue. We respectfully refer this Court to our discussion of this subject at pages 6-8, * * * *supra*. As the Circuit Court of Appeals indicated, the issue presented by petitioners' Point V presents an argument that "constitutes a departure from the theory of the pleadings and of the trial before the District Court,[12] but, even on its merits, it could not change the result here" (R. 2023). As a matter of fact, the Bridge Co.'s union depot was never built (Findings 5, 6 and 7, App. i, ii) and the condemned tracks could not, therefore, constitute an adjunct thereto. As previously pointed out, the condemned tracks were no part of the facilities for which the Bridge Co. was chartered (Finding 31, App. ix). Moreover, we think the forfeiture provision was equally applicable to union depot companies and respectfully submit the argument made in the Court of Appeals opinion on this question is unanswerable (R. 2023, 2025).

We respectfully submit that neither the Circuit Court of Appeals nor this Court have jurisdiction to entertain an appeal by the Bridge Co. because the same was not prosecuted within three months of April 24, 1940. We further submit that neither the Bridge Co. nor the

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[12] Authority is that a party cannot on appeal depart from his pleadings (*Maynard* v. *Reynolds*, 8 Cir., 251 Fed. 784, 786; *Wolfberg* v. *State Mutual Life Assurance Co.*, 8 Cir., 36 F. 2d 171, 175; *Bates* v. *Coe*, 98 U. S. 31, 37; *Dahl* v. *Montana Copper Co.*, 132 U. S. 264, 266-267; *Virginian Ry.* v. *Mullens*, 271 U. S. 220, 227-228; *Henry H. Cross Co.* v. *Simons*, 8 Cir., 96 F. 2d 482, 486) and trial theory (*Illinois Central R. Co.* v. *Egan*, 8 Cir., 203 Fed. 937, 939; *National Loan & Investment Co.* v. *Rockland Co.*, 8 Cir., 94 Fed. 335, 336-337; *Gratz* v. *M'Kee*, 8 Cir., 270 Fed. 713, 722; *Mechanics' Ins. Co.* v. *C. A. Hoover Distilling Co.*, 8 Cir., 182 Fed. 590, 593; *Indiana Flooring Co.* v. *District National Bank of Washington*, (App. D. C.) 280 Fed. 522; *Atlantic Brewing Co.* v. *Brennan Grocery Co.*, 8 Cir., 79 F. 2d 45).

Development Co. have shown any reason for the issuance of a writ of certiorari herein and, accordingly, we respectfully submit the application should be denied.

Respectfully submitted,

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